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MEMORANDUM

To: Frederick County Planning Commission (FCPC)

From: Kathy L. Mitchell, Senior Asst. County Attorney

Date: March 10, 2023

Re: Gordon Mill/Blentlinger Legal Issues

The FCPC has asked the County Attorney's Office to respond to two items related to the Gordon Mill/Blentlinger development. The first is the legal issues raised by Ms. Rosenfeld in her letter to the FCPC dated February 13, 2023. The second is an explanation of the decision of the Maryland Court of Appeals (now the Maryland Supreme Court) in the appeal of approval of the Blentlinger DRRA.

A. Ms. Rosenfeld's Letter dated February 13, 2023 (the "Letter")

1. Guarantee Questions – The Letter evidences confusion about the difference between the financial guarantee required by the Blentlinger Rezoning Ordinance[1] (hereinafter, the "Ordinance") and the APFO Letter of Understanding ("LOU") required by Chapter 1-20 of the County Code.

Condition No. 3 of the Ordinance states:

> *No residential plat may be recorded until one of the following conditions is met:*
> *Either;*
> *The planned arterial through the Blentlinger PUD and the adjoining Casey PUD, as well as the improvements to MD75 from the Casey project entrance to just north of the MD 75/MD 144 intersection is guaranteed,*
> *Or;*
> *The planned New Market Parkway, as well as the improvements to MD75 from the Bypass to just north of the MD 75/MD 144 intersection is guaranteed.*

And, as you are aware, the Gordon Mill/Blentlinger developer has chosen the second option listed above, which is to guarantee the New Market Parkway and the MD 75 improvements from the Parkway to the MD 75/MD 144 intersection.

[1] Ordinance No. 14-27-682

The Letter asserts that the APFO LOU does not satisfy Ordinance Condition No. 3 - that "the 'guarantee' is no guarantee". One of the main reasons cited is that the APFO LOU allows the "Gordon Mill applicant to obtain 499 building permits (of 610 permits) before the Bypass and connection to MD 75 must be open."

It is important to note that the APFO LOU is not a guarantee, and never has been. The purpose of the LOU is to specify what the developer needs to do to satisfy adequacy requirements for water, sewer, roads, and schools. The LOU allows 499 building permits to be issued prior to the Bypass and connection to MD 75 being open to traffic, but that requirement is related to road adequacy. It is *not* related to the financial guarantee that must be in place prior to the recordation of the first residential plat in the Gordon Mill/Blentlinger development.

The Letter also argues that the LOU does not list the required dollar amount of the financial guarantee for the road improvements. Again, that is because the LOU is *not* the guarantee. In addition, that amount is not yet known. To determine the amount required for the financial guarantee, the improvement plans for the road improvements must be approved. This has not yet happened because the improvement plan phase comes after Preliminary Plan approval.[2] When improvement plans have been approved, then the amount of the guarantee – the funds that will be needed to complete the improvements – can be determined. When that has been done, the guarantee can be collected, in the form of a cash escrow, a letter of credit, a bond, or some combination of these methods.

The Letter goes on to bring up a number of *possible* disasters: 1) What if the developer defaults? 2) What if the developer quits after building the 499th house? 3) What if the developer cannot get the necessary easements? First, these problems are always a possibility with any development. Second, *and most importantly*, that is exactly why the County will collect and hold a financial guarantee. The guarantee will be of sufficient value to complete construction of the road improvements if necessary.

Bottom line: The APFO LOU is not the financial guarantee required by the Ordinance, and any concerns about the LOU should be looked at in the context of the APFO provisions of the County Code.

2. School Capacity Testing – The Letter states that the County Code (as it existed in 2014) does not state that the APFO Test Date "is the operative date for testing school capacity." This is simply wrong.

The APFO Test Date is defined the same today and in the 2014 APFO as "The later of: (1) the date of plan submission, or (2) the first date upon which all necessary APFO documentation and materials have been submitted." In addition, §1-20-62(K)(1) (School Construction Fees) in the

[2] Section 1-16-110 (Improvement Plans) of the Subdivision Regulations states "The plans shall be submitted and approved by the Division prior to plat recordation".

2014 APFO very clearly states that the developer does not have the right to use the School Construction Fee option if the *current enrollment as of the APFO Test Date* is over 120%. In the case of the Gordon Mill/Blentlinger development, no school serving or proposed to serve the development had a current enrollment (as of the APFO Test Date) that was over 120% of state rated capacity.

The Letter also asserts, relying on the language in §1-20-62(K)(2), that the 2014 Code requires the Planning Commission to consider the first 2 years of the APFO test period. This, again, is based on a misreading or misinterpretation of the Code. The full text of §1-20-62(K), as it existed in 2014 is:

> *(K) The developer shall not have the option to satisfy the school adequacy provisions of this chapter by payment of the school construction fee if any school serving or proposed to serve the proposed development exceeds 120% of state rated capacity, after taking the following factors into account:*
>
> *(1) the current enrollment as of the of the APFO Test Date; and*
> *(2) actual capacity expected to be provided by new schools and school additions scheduled for construction in the first two years of the CIP. [Emphasis added]*

The language in subsection (K)(2) does not *require* the Planning Commission to look at the first 2 years of the school adequacy test in all cases. The "actual capacity expected to be provided by new schools and school additions scheduled for construction in the first two years of the CIP" is a factor to be considered in determining whether the developer can use the School Construction Fee Option *only* when the current enrollment as of the APFO Test Date actually exceeds 120% of state rated capacity. The school capacity to be added by school additions or construction in the first 2 years of the County CIP could only decrease the percentage of state rated capacity.

In fact, subsection (K)(2) was added at the request of certain developers during the process of adding the School Construction Fee provisions. They wanted the additional school capacity in that 2-year CIP period to be used to mitigate the current enrollment numbers if they exceeded 120%. For example, if the enrollment of an elementary school serving the proposed development is currently 120% of state rated capacity, but a new elementary school is included in the first 2 years of the CIP, then the capacity (number of student seats) provided by the new school could be taken into account to lower the state rated capacity to some number less than 120%, and allow the development to use the School Construction Fee option.

Bottom Line: The arguments in the Letter concerning the use of the School Construction Fee option are incorrect, and misinterpret the applicable 2014 County Code provisions. In addition, the examples submitted as Exhibit 4B to the Letter are not relevant, since the *current enrollment* for all schools analyzed in those tests did not exceed 120%.

3. Stormwater Management (SWM) - This entire section of the Letter is irrelevant to and not within the authority of the Planning Commission for the reasons set forth below.

The SWM chapter in the Frederick County Code (Chapter 1-15.2) is authorized under the *Environment Article* of the MD Code. Section 4-201 of the Environment Article states that the State SWM regulations apply "to development occurring within the unincorporated areas of Frederick County and may apply to the incorporated areas within the geographical limits of Frederick County…." The authority to enforce SWM regulations comes from the Maryland Department of the Environment (MDE). The County Code provisions for SWM are reviewed and approved by the MDE. County environmental staff apply the relevant SWM regulations to development applications. The MDE audits the County's program every 3 years or so, except that COVID has delayed the most recent audit.

In contrast, the authority to establish a Planning Commission comes from §2-101 of the *Land Use Article* of the MD Code. The FCPC's miscellaneous powers and duties are listed in §2-105. Its authority for other areas, such as zoning, subdivision, APFO, MPDUs, DRRAs, and the Comprehensive Plan are found throughout the remainder of Division I of the Land Use Article (Single Jurisdiction Planning and Zoning). Section 1-13-16 of the Frederick County Code establishes the FCPC, and §1-13-21 states that the "County Planning Commission shall have all the powers, functions and duties provided for in Md. Ann. Code, Land Use Article § 2-105 and 3-101 and following."

There is nothing in the MD Code that authorizes any Planning Commission to approve or deny SWM compliance as part of its approval of a development application. Nothing in the County Code authorizes the FCPC to determine whether the SWM regulations have been satisfied. In fact, §1-15.2-1.0(B) of the County Code states that: "The Frederick County Community Development Division [now the Division of Planning and Permitting] shall be responsible for the coordination and enforcement of the provisions of this chapter." Even though SWM information may sometimes be added to a plan that comes before the FCPC, it is not subject to FCPC approval or denial.

Bottom Line: The SWM issues raised in the Letter are not within the authority of the Planning Commission.

B. Blentlinger v. Cleanwater Linganore, Court of Appeals Opinion, October 10, 2017

In this case, Cleanwater Linganore ("Cleanwater") appealed the Board of County Commissioners' November 2014 approval of the Blentlinger Development Rights and Responsibilities Agreement ("DRRA") to the Frederick County Circuit Court. In its memorandum in support of its appeal, Cleanwater argued that the Blentlinger DRRA was void for lack of consideration because Petitioners had failed to provide any enhanced public benefits as consideration for the DRRA.

After a hearing, the Circuit Court affirmed the BOCC's approval of the Blentlinger DRRA. The Court rejected the argument that the DRRA was not supported by adequate consideration, and

concluded that the Blentlinger "DRRA imposes both binding obligations and legal detriment to" the applicant/developer.

Cleanwater then appealed the decision of the Circuit Court to the Maryland Court of Special Appeals, which is Maryland's intermediate court.[3] The Court of Special Appeals reversed the judgment of the Circuit Court and remanded the case with instructions to vacate the Blentlinger DRRA. The Court of Special Appeals held, among other things, that the Blentlinger DRRA was void for lack of consideration because it lacked any enhanced public benefits to the County.

The applicant/developer appealed that decision to the Maryland's highest court, the Court of Appeals. The issue before the Court whether, in order to be valid, a DRRA is *required* to provide enhanced public benefits to the County. The Court held that there was no evidence in the DRRA statute, its legislative history, or in case law, demonstrating an intent to require enhanced public benefits as part of a valid DRRA. Therefore, the Court reversed the Court of Special Appeals decision and held that the Blentlinger DRRA was valid, since it was not required to confer any enhanced public benefit to the County, and was supported by sufficient consideration.

[3] Now known as Maryland Appellate Court.